Supreme Court, U.S.
FILED
AUG 19 1996
CLERK

(15)

No. 95-1649

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

vs.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE NATIONAL MENTAL HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

IRA A. BURNIM
Counsel of Record for Amicus Curiae
MICHAEL ALLEN
JUDGE DAVID L. BAZELON CENTER
FOR MENTAL HEALTH LAW
1101 - 15th Street, NW, #1212
Washington, DC 20005
202-467-5730

BEST AVAILABLE COPY

25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. SUBSTANTIVE DUE PROCESS REQUIRES A SHOWING OF MENTAL ILLNESS AND DANGEROUSNESS BEFORE A PERSON CAN BE SUBJECT TO INVOLUNTARY CIVIL COMMITMENT 5

II. THE AMENABILITY TO, AND AVAILABILITY OF, TREATMENT FOR PEOPLE WITH BONA FIDE MENTAL ILLNESS DISTINGUISHES THEM FROM SEXUALLY VIOLENT PREDATORS 12

III. COMMITTING VIOLENT SEXUAL PREDATORS 14

IV. CONFINING SEXUALLY VIOLENT PREDATORS IN MENTAL HEALTH FACILITIES WILL FURTHER STIGMATIZE PEOPLE WITH BONA FIDE MENTAL ILLNESS AND DISCOURAGE THEM FROM SEEKING TREATMENT 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases *Page*

Addington v. Texas, 441 U.S. 418 (1979) 5, 17

Allen v. Illinois, 478 U.S. 364 (1986) 12, 14

Eckherhart v. Hensley, 475 F.Supp. 908 (W.D.Mo. 1979), *aff'd*, 664 F.2d 294 (8th Cir. 1980). 12

Foucha v. Louisiana, 504 U.S. 71 (1992 ..... 5, 12

Foucha v. Louisiana, 504 U.S. 71, 80 (1992) 2, 6

Humphrey v. Cady, 405 U.S. 504 (1972) 14

In re Care and Treatment of Hendricks, 912 P.2d 129 (Kan. 1996) 7, 10, 12, 13

In re Personal Restraint of Young, 122 Wash.2d 1, 857 P.2d 989 (1993) 6

Jones v. United States, 463 U.S. 354 (1983) 5, 14

Marshall v. United States, 414 U.S. 417 (1974) 8

Vitek v. Jones, 445 U.S. 480 (1980) 17

Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995 ..... 12, 13

Table of Authorities (cont.)

Page

Kansas Statutes

Kan. Stat. Ann. § 59-29a01 ..... 8, 10, 13

Kan. Stat. Ann. § 59-29a02(b) 11

Other Authorities

Bernard S. Arons, M.D., Director, Center for Mental Health Services, U.S. Department of Health and Human Services, Remarks to the West Virginia Mental Health Association Annual Meeting, June 16, 1995 17

ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, PRACTITIONERS HANDBOOK 1 (undated). 12

Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Act*, 32 HOUS. L. Rev. 775(1995). 7, 13

DEUTSCH A., THE SHAME OF THE STATES (1948) 16

Michael B. Friedman, Research on Stigma (unpublished paper, October 20, 1989) 18

L. Furby, M.R. Weinrott, & L. Blackshaw, *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3 (1989) 14

Table of Authorities (cont.)

Page

W. L. Marshall *et al.*, *Treatment Outcome with Sex Offenders*. 11 CLINICAL PSYCHOL. REV. 465 (1994) . 14

LEON RAPPOPORT, PERSONALITY DEVELOPMENT: THE CHRONOLOGY OF EXPERIENCE 174 (1972) 8

THE ROBERT WOOD JOHNSON FOUNDATION PROGRAM ON CHRONIC MENTAL ILLNESS, PUBLIC ATTITUDES TOWARD PEOPLE WITH CHRONIC MENTAL ILLNESS (1990). 19

Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437 (1995) 7

OTTO F. WAHL, MEDIA MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS 102 (1995) 17-19

Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 597 (1992) 11

Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 Psychol. Pub. Pol'y & L. 534 (1995) 7, 12

No. 95-1649

In The

Supreme Court of the United States

October Term, 1995

STATE OF KANSAS,

Petitioner,

vs.

LEROY HENDRICKS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE NATIONAL MENTAL HEALTH ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

National Mental Health Association ("NMHA") is the national citizens' voluntary advocacy organization working with and on behalf of people with mental illness. With 600 affiliates in 43 states and the District of

Columbia, NMHA has worked toward eliminating discrimination against people with mental illness since 1909. The alleviation of stigma and public misconceptions about mental illnesses and the people who have them is a continuing emphasis of NMHA and its affiliates. Part of NMHA's mission is to advocate for sufficient resources for people with mental health treatment needs across the United States. The outcome of the case before the Court will have a substantial impact on NMHA, its affiliates and the community members which they serve.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus is familiar with, and supports, the arguments of *amicus* American Civil Liberties Union that the Kansas Sexually Violent Predator Act is constitutionally infirm on substantive due process grounds. The Kansas statute is a misguided attempt to "medicalize" the behavior of people who commit sexually violent offenses, and thereby blurs the distinction between incarceration for violent criminal behavior and civil commitment upon a showing of mental illness, to the serious detriment of people with mental illness.

Amicus does not dispute that sexually violent predators should be subjected, for the safety of society, to some form of social control. Kansas has a legitimate interest in confining "sexually violent predators," but it must do so in a manner that comports with the Constitution and this Court's precedents. Civil commitment must be reserved for those who are mentally ill, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), including offenders who have bona fide mental disorders and who are dangerous

to self or others. It is not appropriate for violent sex offenders who have no recognized mental illness.

The Kansas Legislature passed the Act in an attempt to remedy the effects, beginning in the late 1970s, of lenient sentencing practices for sexually violent offenders. Now finding itself faced with the release from prison of offenders who are still considered dangerous, the Legislature attempted to create a new system of social control to continue these offenders' confinement. The problem Kansas sought to address by passing the Sexually Violent Predator Act can be solved prospectively by the imposition of longer prison sentences for sexual offenders.

Leading researchers have concluded that sexually violent criminal behavior is relatively intractable, and there is little evidence that treatment effectively reduces recidivism. Moreover, mental health facilities are largely unequipped to handle the treatment needs of violent sexual predators, and lack the experience necessary to deal with such a population. Further, without assurances that sexually violent predators will be segregated in state mental health facilities, there exists a real risk that they will continue their predatory behavior against the general population of persons with serious mental illness.

The inevitable result of committing sexually violent predators to mental health facilities will be a significant diversion of resources away from the care of people with treatable mental illness. Because of the absence of effective treatments, violent sex offenders will be warehoused in state mental hospitals, consuming scarce

resources, and displacing the service needs of large numbers of law-abiding people with treatable mental illness.

Furthermore, committing sexually violent predators to mental health facilities adds to the stigma surrounding mental illness because it promotes the idea that hospitals are not places for recovery, and further inflames a public that believes that people with mental illness are prone to violence.

ARGUMENT

I. SUBSTANTIVE DUE PROCESS REQUIRES A SHOWING OF MENTAL ILLNESS AND DANGEROUSNESS BEFORE A PERSON CAN BE SUBJECT TO INVOLUNTARY CIVIL COMMITMENT

While recognizing that society has legitimate reasons to curtail the liberty of violent persons, this Court has maintained a bright line between incarceration for criminal behavior and commitment on the basis of mental illness and dangerousness. In each context, it has insisted on scrupulous adherence to due process in order to protect the rights secured to individuals by the Fifth and Fourteenth Amendments.

Due process in the criminal law context has required both procedural and substantive safeguards, including the right to jury trial, the privilege against self-incrimination and the requirement for conviction based on evidence beyond a reasonable doubt.

In considering civil commitment of individuals with mental illness, this Court has required that confinement may only be imposed where a person is both mentally ill *and* presently dangerous. *Addington v. Texas*, 441 U.S. 418 (1979); *Jones v. United States*, 463 U.S. 354, 363 (1983). As recently as 1992, in *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court emphasized that both the mental illness and the dangerousness prongs must be satisfied for a civil commitment to comport with the Due Process Clause. In *Foucha*, the Court struck down a state law providing for

the indefinite confinement of an insanity acquittee who was no longer mentally ill, on the basis of his potentially being dangerous due to his antisocial personality. In *Foucha*, Justice White wrote that antisocial personality alone could not justify commitment:

> This rationale would permit the state to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he had completed his prison term.* It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

504 U.S. at 82-83 (emphasis supplied). *See also In re Personal Restraint of Young*, 122 Wash.2d 1, 60, 857 P.2d 989, 1018 (1993) (Johnson, J., dissenting) ("[B]y authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, [Washington's Community Protection Act] threatens not only the liberty of certain sex offenders, but the liberty of us all").

While Kansas clearly faces a public safety dilemma when the prison terms of sexually violent offenders expire, it may not constitutionally resolve that dilemma by blurring the line between incarceration and civil

commitment.[1] Yet that is precisely what the Kansas statute purports to do. It civilly commits sexually violent predators without any evidence that their criminal behavior is caused by mental illness.

The term "mental illness" is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges whose origin, in any case, is unrelated to mental illness.[2] Criminal behav

---

[1] The criminal justice system is the more appropriate system for handling sex offenders, and the Supreme Court has given states wide latitude to impose long prison sentences for violent sexual offenses. As Justice Lockett said in his concurring opinion: "Without violating the Constitution, the State could have incarcerated Hendricks until he exhaled his last breath and his spirit departed this earth, but it did not." *In re Care and Treatment of Hendricks*, 912 P.2d 129, 139 (Kan. 1996) (Lockett, J., concurring).

[2] *See, e.g.*, Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437, 451-452 (1995) ("Neither sexual assault nor the paraphilias...entail psychological aberration apart from the desire to perform such conduct and the willingness to act on that desire....Insofar as mental illness means a pattern of impaired psychological capacities, [sexually violent predators] as a group demonstrate none."); Winick, Bruce J., *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 Psychol. Pub. Pol'y & L. 534, 572-573 (1995)("...many of the 'personality disorders' do not seem to be 'illnesses' in an organic sense (although they do reflect maladaptive behavior patterns). The 'impulse control disorders'...or the sexual disorders known as paraphilias...also do not seem to be illnesses in this sense. Unless the individual has a multiple diagnosis, these problems are not though to be organic in nature and do not respond to organic treatment methods of the kind for which hospitalization is medically justified."); Comment, *The Importance of Being Insane: Sexual Predator Civil*

ior, including sexually violent behavior, is more often the product of a failure of moral development, or insufficient impulse control, than it is a result of mental illness. *See* LEON RAPPOPORT, PERSONALITY DEVELOPMENT: THE CHRONOLOGY OF EXPERIENCE 174-175, 244 (1972).

That "sexually violent predators," as defined in the Sexually Violent Predator Act, do not suffer from mental illness is borne out by the language and legislative history of the statute, as well as by research. The Kansas Legislature justified enactment of the statute on the basis that sexually violent predators "do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons," Kansas Statutes Annotated (hereinafter, "K.S.A.") § 59-29a01.

In defense of its law, Kansas asserts that it has broad discretion to define "mental illness" for constitutional purposes,[3] Brief of Petitioner at 39, and that the use of

---

Commitment Laws and the Idea of Sex Crimes as Insane Act, 32 HOUS. L. Rev. 775, 804 (1995) (rape and other sexually violent criminal behavior is caused by "any distinct, consistent mental pathology. In other words, the psychological factors that lead to rape are not very different from the psychological factors that lead to other serious crimes that are not generally thought to be caused by mental illness.").

[3] While this Court has given states wide latitude to define mental illness, and to prescribe systems for involuntary civil commitment, no such deference is owed to the Kansas statute because it involves no "medical or scientific uncertainties," *Marshall v. United States*, 414 U.S. 417, 427 (1974).

"mental abnormality" does not work a substantive change to the civil commitment scheme endorsed by this Court. In fact, however, the Kansas statute strikes at the very heart of that system by failing to require a finding of mental illness to support commitment. The discretion afforded to the state can revive a statutory scheme that ignores such a basic due process requirement. If Kansas were correct in asserting that the Act imposes no substantive change in the definition of a mental illness, there would have been no need to enact it. The director of corrections could simply have instituted civil commitment proceedings against all those who were a danger to others as a result of a diagnosed mental illness.

Instead, because the Kansas Legislature recognized that the civil commitment system was not appropriate for sexually violent predators, it had to create a legal fiction of "mental abnormality" in the hope that the Act would pass constitutional muster. The Legislature specifically found that sexually violent predators are not mentally ill[4],

---

[4] The legislative findings are as follows:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist *who do not have a mental disease or defect* that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 *et seq.* and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 *et seq.* and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment

and it is precisely because of that fact that the State had to create this new and illegitimate system. The definition of a "mental abnormality" leaves no doubt that it is intended to apply to a group that has not been considered, and is not, mentally ill.

Reviewing the statute and legislative history, the Kansas Supreme Court held that the statute does not require a finding of mental illness: "If there is nothing to treat under [the civil commitment for mental illness statute], then there is no mental illness....By such language, the legislature recognizes that sexually violent predators are not mentally ill but, rather, have an 'antisocial personality feature' or a 'mental abnormality.'" *In re Care and Treatment of Hendricks*, 912 P.2d 129, 136-137 (Kan.

---

modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 *et seq.* and amendments thereto is inadequate to address the risk that sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different [from] the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 *et seq* and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature. (K.S.A. § 59-29a01)(emphasis supplied).

1996). The Kansas Supreme Court thus held that "[a]bsent such a finding [that the term "mental abnormality or personality disorder is a mental illness as defined by state law], the Act does not satisfy the constitutional standard set out in Addington and Foucha." *Id.* at 138.

The term "mental abnormality"[5] takes in a very broad range of behavior, including poor impulse control. "'Mental abnormality' is much broader than any conceivable contemporary psychiatric diagnosis of mental disorder or mental illness." Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 597, 602 (1992). Neither personality disorder nor antisocial personality disorders are particular to sex offenders, and therefore almost any person convicted of sex crimes could be said to have such a disorder. The result is a criterion which can be stretched to fit all sex offenders, whether mentally ill or not. Similarly, "personality disorder," by itself, is not enough to support the label of "mentally ill" for purposes of civil commitment.

The federal courts have recognized what the Kansas Legislature concedes in the Act's legislative history: sexual predators do not, *per se*, have mental illness, but have "antisocial personality features which are unamenable to existing mental illness treatment modalities, and for

---

[5] K.S.A. § 59-29a02(b): "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

which the prognosis of cure is poor." *Young v. Weston*, 898 F. Supp. 744, 749 (W.D. Wash. 1995). *See also Foucha*, 504 U.S. at 75 (describing antisocial personality as a condition which is not a mental disease);[6] Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534 (1995). Indeed, in the Kansas trial court, Dr. Befort, the state's expert, "testified that he did not believe Hendricks was mentally ill or had a personality disorder but that, as he interpreted the Act, pedophilia was a mental abnormality." *Hendricks*, 912 P.2d at 131.

II. THE AMENABILITY TO, AND AVAILABILITY OF, TREATMENT FOR PEOPLE WITH BONA FIDE MENTAL ILLNESS DISTINGUISHES THEM FROM SEXUALLY VIOLENT PREDATORS

This Court has suggested that a sexual offender commitment statute may be upheld only if it provides bona fide treatment as an alternative to punishment. *Allen v. Illinois*, 478 U.S. 364 (1986). Other federal courts have held that a person who has been civilly committed has a constitutional right to "that treatment as is minimally adequate to provide him a reasonable opportunity to be cured or to improve his mental condition." *Eckherhart v.*

---

[6] According to the professional group representing sexual abuse treatment providers, "[s]exual deviance is a learned or acquired behavioral disorder. Treatment is focused on recognizing, changing and managing deviant behavior and the attitudes that promote it. Sexual deviance is not considered to be a disease that can be cured." ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, PRACTITIONERS HANDBOOK 1 (undated).

Hensley, 475 F.Supp. 908 (W.D.Mo. 1979), *aff'd*, 664 F.2d 294 (8th Cir. 1980).

As the Kansas Supreme Court recognized, the state's Sexually Violent Predator Act does not seek to provide treatment, but simply to continue incarceration. *Hendricks*, 912 P.2d at 136. Even without arguing that treatment is constitutionally required, the concession that the mental health system in Kansas does not have the "treatment modalities," K.S.A. § 59-29a01, necessary for sexually violent predators makes clear that the sexually violent predators the Legislature wants to confine differ from people with mental illness who need, and can benefit from, treatment.

As further evidence that the Legislature did not intend to provide treatment to sex offenders, the Court need only consider that Kansas apparently offered none during Hendricks' incarceration. Only on the eve of his release did the issue of treatment arise, and then only to try to justify commitment. As the federal district court, considering the virtually identical Washington statute, held in *Young v. Weston*, the statute "plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute." 898 F. Supp. at 753. There can be no justifiable purpose in maintaining that a convict is in need of treatment, but then withholding it until the person has served his entire prison sentence. In the end, if there is no treatment, commitment is not permissible.[7]

---

[7] "[A] diagnosis of some clear and treatable mental illness seems a necessary prerequisite to the kind of effective treatment that must be provided [under *Allen v. Illinois*]." Comment, *The Importance of Being*

In fact, the professional research supports the Kansas Legislature's finding that there is little, if any, effective treatment for violent sex offenders.[8] It is sex offenders' very non-amenability to treatment with mental health "modalities" that characterizes the statute's purpose as penal rather than rehabilitative. As established by the Kansas legislature, treatment is only an afterthought, tacked on to fulfill the treatment mandate set down by this Court in *Humphrey v. Cady*, 405 U.S. 504 (1972), *Allen* and *Jones*.

By contrast, the facilities to which sexually violent offenders would be committed under the Kansas statute are specifically designed to provide treatment to a population that *is* capable of benefiting from it: people with bona fide mental illness.

III. COMMITTING VIOLENT SEXUAL PREDATORS TO THE MENTAL HEALTH SYSTEM WILL SERIOUSLY HARM PEOPLE WITH BONA FIDE MENTAL ILLNESSES AND FOR THE PUBLIC

By devising a system of civil commitment of sex offenders, Kansas has set the stage for a significant diversion of resources from the mental health system. The

---

Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Act, 32 HOUS. L. REV. 775, 801 (1995).

[8] *See, e.g.*, W.L. Marshall *et al.*, *Treatment Outcome with Sex Offenders*. 11 CLINICAL PSYCHOL. REV. 465-485 (1994); L. Furby, M.R. Weinrott, & L. Blackshaw, *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3 (1989).

inevitable result of committing sexually violent predators to mental health facilities will be a diversion of resources away from the care of people with treatable mental illness. This funding is to be redirected to a population that the Legislature itself admits is not amenable to mental health treatment, and for which experts hold out very little hope OF effective treatment. Violent sex offenders will be warehoused in state mental hospitals, consuming significant resources, and displacing services for large numbers of law-abiding people with treatable mental illness.

The absence of a mental illness requirement not only makes the Kansas statute constitutionally infirm, but will also result in highly inappropriate state hospital placements.

Eliminating the essential linkage between civil commitment and mental disability destroys the therapeutic function of mental health facilities and the professionals who work in them. By requiring state mental hospitals to confine individuals who have no mental illness, the Kansas statute transforms hospitals into prisons and turns mental health professionals into jailors.

Finally, because the Kansas statute does not provide for the segregation of sexually violent predators from the general hospital population, there is strong reason to believe that they will continue their predatory behavior—whether sexual or otherwise—against people who are especially vulnarable due to their mental illness and their confinement. In the absence of programs to treat the underlying predatory behavior and without experienced

staff, mixing of these populations will have severe, unintended consequences.

IV. CONFINING SEXUALLY VIOLENT PREDATORS IN MENTAL HEALTH FACILITIES WILL FURTHER STIGMATIZE PEOPLE WITH BONA FIDE MENTAL ILLNESS AND DISCOURAGE THEM FROM SEEKING TREATMENT

By forcing the square peg of antisocial behavior into the round hole of "mental illness," the Kansas statute subverts the important progress that has been made in destigmatizing mental health treatment, and encouraging people with mental illness to seek early treatment and support. It also risks trivializing the process of identifying and treating diagnosed mental illnesses. This dilution of the "treatment and recovery" model will have long-lasting, adverse consequences for people with mental illness and for society.

After slow but steady progress in transforming state mental hospitals and other mental health facilities from "warehouses" and "snakepits," *cf.* A. DEUTSCH, THE SHAME OF THE STATES (1948), into more modern, therapeutic communities focused on effective treatments, warehousing violent sex offenders without effective treatment represents a major reversal of course. Sending sexually violent predators to mental health facilities which, as the Legislature has recognized, are largely unequipped to handle their treatment needs, adds to the stigma surrounding mental illness because it promotes the idea that hospitals are not places for recovery, and further inflames

a public that believes that people with mental illness are prone to violence.

The Supreme Court has, on several occasions, recognized that people who seek treatment for mental illness suffer from stigma, which can have have long-term, adverse effects on their lives. *See Vitek v. Jones*, 445 U.S. 480, 492 (1980). In *Addington v. Texas*, 441 U.S. 418, 425 (1979), the Court wrote:

> [I]t is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

Researchers have found that, by itself, stigma discourages people with mental illness from seeking treatment.[9]

---

[9] *See, e.g.*, Bernard S. Arons, M.D., Director, Center for Mental Health Services, U.S. Department of Health and Human Services, Remarks to the West Virginia Mental Health Association Annual Meeting, June 16, 1995 ("We still have a society in which the image of mental illness is mixed together with images of violence, of ridicule, of fear, and of misunderstanding....The problem is that, once you get help, you become labeled as `mentally ill,' and you are at risk for social ostracism and public discrimination....Treatments for mental illness are more successful than those for heart disease, angioplasty and many other medical illnesses. Yet, many people do not seek treatment because of the fear of stigma"). *See also* OTTO F. WAHL, MEDIA

"Services will continue to be rejected by large numbers of people until we have dealt with both their internal shame and with the stigmatizing impact of many professional service structures....Stigma is a major impediment to realizing the goals of community mental health."[10]

Stigma also affects public policy. Unfounded stereotypes about the dangerousness of people with mental illness may contribute to public unwillingness to fund mental health services and to provide essential supports such as housing and job training in the community.[11]

Confining violent criminals in facilities for people with mental illness will encourage the false, but widespread, impression that all people with mental illness are

---

MADNESS: PUBLIC IMAGES OF MENTAL ILLNESS 102 (1995) ("Stigma also undermines the search for treatment. Those who are reluctant to acknowledge their disorders are also likely to delay (or avoid altogether) seeking appropriate psychiatric help, because that treatment will itself mark them as undesirable.")

[10] Michael B. Friedman, Research on Stigma (unpublished paper, October 20, 1989), at 3, 16.

[11] "[S]tereotypes of the dangerous mental patient, furthermore, may contribute to the unavailability of needed resources for recovery by fueling opposition to the presence of individuals with mental disorders in the community....And once people do leave psychiatric hospitals--people whose need for support and acceptance may be particularly acute--they are likely to be met instead with suspicion and fear....The end result is that large numbers of people with serious mental illness either remain unnecessarily in isolated hospital environments or add to our growing homeless population because there are too few communities or too few affordable residences in which they are allowed to live." WAHL, *supra* note 9, at 94-95.

violent and unpredictable.[12] Because the public is not well-informed about the origins and treatment of mental illness,[13] it tends not to differentiate between treatable mental illnesses that are not associated with violence and the "mental abnormality" the Kansas statute ascribes to sexually violent predators. By breaking the essential connection between civil commitment and mental illness, the Kansas statute will feed this misunderstanding.

---

[12] Despite significant evidence that well over 90% of people with mental illness do not exhibit violent tendencies the public believes there is a much stronger correlation between mental illness and violence. See WAHL, *supra* note 9, at 80-82. Even those few studies that correlate MI and violence, "these studies do not establish that mental illness itself accounts for the violence demonstrated. For some individuals who are both mentally ill and violent, the mental illness may be irrelevant to the violent or criminal behavior shown. Just as some non-mentally ill individuals rob, assault, or kill for profit or passion, those with mental illnesses may act out of those same "normal" motives....Because mental illness and violence both occur does not necessarily mean that the violence was caused by the mental illness." *Id.* at 79.

[13] *See, e.g.*, THE ROBERT WOOD JOHNSON FOUNDATION PROGRAM ON CHRONIC MENTAL ILLNESS, PUBLIC ATTITUDES TOWARD PEOPLE WITH CHRONIC MENTAL ILLNESS (1990).

CONCLUSION

For the reasons set forth above, *amicus* urges this Court to affirm the decision of the Kansas Supreme Court.

Respectfully submitted,

IRA A. BURNIM
Counsel of Record for Amicus Curiae
MICHAEL ALLEN
JUDGE DAVID L. BAZELON CENTER
FOR MENTAL HEALTH LAW
1101 - 15th Street, NW, #1212
Washington, DC 20005
202-467-5730